

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 22 OF 2022

(Originating from Land Application No. 55 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi).

TERITULA LYIMO..... APPELLANT

VERSUS

MICHAEL CHRISTOPHER MOSHI..... RESPONDENT

JUDGMENT

08/11/2022 & 05/12/2022

SIMFUKWE, J.

The respondent Michael Christopher Moshi successfully instituted a land dispute before the trial tribunal against the appellant herein alleging that the appellant had trespassed into his piece of land measuring 12 meters length and 12 meters width situated at Mwika Kusini Ward in Moshi District. The appellant alleged that the disputed land was owned by her father-in-law.

The trial tribunal found that the disputed land belonged to the respondent herein and decided in his favour, hence this appeal. The appellant raised eight grounds of appeal:

1. *That the Trial District Land and Housing Tribunal erred in law and fact when decided in favour of the Respondent without take note that he lacked locus standi.*
2. *That the Learned Chairman of the District Land and Housing Tribunal erred in law and fact when decided in favour of the Respondent relying on the evidence adduced among other evidence of locus in quo while Trial Chairman contravene the guidelines to be followed when the Tribunal decides to visit locus in quo. (sic)*
3. *That the Trial Chairman erred in fact when overrule (sic) preliminary objection on point of law that the Tribunal lack jurisdiction to hear the matter before it hence the decision thereto became nullity.*
4. *That the Trial Chairman of the District Land and Land and Housing Tribunal erred in law and facts when held that the suit land belong to the applicants without take note that if it was representative suit the procedures were not dully followed.*
5. *That the Trial Chairman of the District Land and Housing Tribunal erred in law and facts when departed from assessors' opinions without adduced reasons thereto hence contravene section 24 of the Land Disputes Courts Act, Cap 216 R.E 2019. (sic)*
6. *That Trial Chairman of the District Land and Housing Tribunal erred in law and facts when held in favour the Respondent while he failed to properly analyze the Evidence adduced before it. (sic)*

7. *That the Trial Chairman of the District Land and Housing Tribunal erred in law and facts when held in favour of the Respondent based on inconsistencies, contradictory and implausible evidence.*
8. *That the Trial Chairman of the District Land and Housing Tribunal erred in law and facts when held in favour of the Respondent without answer the issue framed before it.*

The appellant prayed that the appeal be allowed with costs by setting aside the said judgment and decree.

The appellant was represented by Mr. Mbaraka, learned counsel, while the respondent was represented by Mr. E. G. Kipoko, learned counsel.

On the outset, the learned counsel for the appellant stated that they were going to rely on three grounds of appeal.

On the 1st ground of appeal, he submitted that it is a requirement of law that where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of court sue or be sued in such suit on behalf of or for the benefit of all persons interested. He made reference to **Order I Rule 8 of the Civil Procedure Code Cap 33 R.E 2019** and **Order VII Rule 4 of the CPC** (supra) which states that one must undertake necessary steps to enable him to institute a representative suit.

Referring to this matter Mr. Mbaraka submitted that in Land Application No. 55/2020 the respondent sued on behalf of Dastan Christopher Moshi, Luka Christopher Moshi and Willence Christopher Moshi. In that regard, the learned counsel was of the view that this is a representative suit since

all of them have similar interest on the suit land but the procedures for representative suit were not adhered as the application does not provide the names of other parties who were being represented by Michael Christopher.

Mr. Mbaraka contended further that Mr. Michael Christopher who was the applicant did not seek leave of the court to represent other applicants in all necessary steps of initiating and instituting the intended suit since all the applicants have the same interest. He referred to page 1 of the judgment of the trial court where a Power of Attorney was tendered and elaborated that it was contrary to the procedures of representative suit. He said that Power of Attorney may be applicable where relatives are out of the country or if they were incapacitated.

In support of his argument, Mr. Mbaraka cited the case of **Abdallah Mohamed Msakandeo and 2 Others versus City Commissioner of Dar es Salaam and two Others [1998] TLR 439** in which the court held that: *the provision of **Order I Rule 8 of the Civil Procedure Code** (supra) requires an application for leave to file representative suit to establish that numerous persons are similarly interested in the suit and they are willing to join.* He said that in the instant matter it is clear that the applicant did not seek leave to represent others instead he tendered power of attorney which does not prove if the other applicants have similar interest and are willing to join.

On the second ground of appeal which is in respect of visit of the locus in quo, the learned counsel submitted that visit of locus in quo is not statutory provided for, the court has in numerous occasions stated that where the trial court deems it necessary to visit locus in quo then it is

bound to carry out properly. He made reference to page 28 of the proceedings of the trial tribunal which is in respect of visit to the locus in quo and opined that it is not clear as to what transpired during the visit. That there is no any sketch map in the record of appeal and there were no witnesses from any side, no evidence adduced on oath nor cross examination done by either party or their counsel. That, there was flouting of the procedure during the visit that occasioned a miscarriage of justice. Mr. Mbaraka cemented the issue of visiting the locus in quo by referring to the cases of **Nizar M.H v. Gulamali Fazal John Mohamed [1980] TLR 29** and **Kimoni Dimitri Mantheakis v. Ally Azim Dewji and Others, Civil Appeal No. 4 of 2018**, CAT at page 8; in which what should be done during the visit to the locus in quo was outlined.

On the third ground of appeal which is in respect of jurisdiction, it was submitted that jurisdiction of the court is neither an option of parties nor court but its statutory creation. The learned counsel averred that this application was filed on 6th day of April 2020 when the position of the law by then concerning jurisdiction of the Ward Tribunal was provided for under **section 15 of the Land Disputes Courts Act, Cap 216 R.E 2019** which provides that the Ward Tribunal had the power to hear and decide land disputes provided the value of the disputed land did not exceed Tzs 3,000,000/-. That, the District Land and Housing Tribunal had no jurisdiction to hear and decide the matter below 3,000,000/.

In our present appeal the estimated value of the disputed land was TZS 1,200,000/-. Mr. Mbaraka was of the view that the matter was to be referred to the Ward Tribunal for adjudication and not the District Land and Housing Tribunal.

Mr. Mbaraka pointed out another illegality that there was Land Appeal No. 10 of 2012 which was ordered to be tried de novo. However, parties in the said case were **Familia ya Ainea Moshi versus Mrs Teritula Lyimo** while in the instant appeal parties are **Michael Christopher Moshi versus Teritula Lyimo**. Meaning that what was filed by the respondent amount to a new case. It was concluded that the Chairman of the District Land and Housing Tribunal erred in law in deciding in favour of the respondent.

Mr. Mbaraka prayed the appeal to be allowed with costs.

Contesting the appeal, Mr. Kipoko submitted that the submissions by the appellant are defective as they are made in the name of and against Michael Christopher instead of the original party Michael Christopher Moshi. He asserted that, it is a serious irregularity on two fronts: first that the said Michael Christopher has never been a party to the proceedings neither before the trial tribunal nor is he a party before this appellate court. Secondly, failure to cite the correct party in the submission renders the submission irrelevant as they are made against a stranger and as such no submissions have been filed as ordered by this court hence the appellant has failed to submit in support of his appeal which amounts to failure to prosecute the appeal.

Mr. Kipoko submitted further that the difference in the names contained in the alleged will and that on the deed of the property the applicant wants to include in the contested will is a serious question. (sic) He made reference to the case of **Christina Mrimi vs Coca Cola Kwanza Bottlers Ltd, Civil Appeal No. 12 of 2008**, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was held that:

"Companies like human beings, have names. They are known and differentiated by their registered names. In the instant case, it is apparent that the names 'Coca Cola Kwanza Bottlers' Coca Cola Kwanza Bottlers Ltd or Coca Cola Bottlers Ltd have been used interchangeably. Although the appellant wants this court to hold that they mean one and the same company, strictly, this view cannot be accepted without some risk of inexactitude. We are mindful of the provisions of Article 107A of the Constitution of the United Republic of Tanzania, an article which requires courts of law to give purposive interpretation of laws as they are and not impeding them with mere technicalities or procedural irregularities. However, as has been held by this court in some of its recent decisions, not all procedural or technical irregularities can be ignored. Some technical irregularities cannot be ignored as they touch on the very fundamentals of the issue at hand....as the result this appeal is incompetent for failure to identify the appropriate party, is struck out."

Mr. Kipoko prayed this court to follow the same line and dismiss this appeal for want of prosecution.

On the first ground of appeal, it was replied that the allegation about the representative suit is misplaced as before the trial tribunal all said and done it was a case filed by MICHAEL CHRISTOPHER MOSHI as an applicant (claimant) and this is testified, first by the Application form in which the Applicant is clearly shown and he signed as MICHAEL CHRISTOPHER MOSHI. And that the applicant MICHAEL CHRISTOPHER MOSHI went on to testify and paraded his witnesses and evidence leading to the tribunal declaring him the lawful owner of the suit land.

On the second ground of appeal, it was replied that evidence which led to the determination of the case before the trial tribunal was taken under oath within the tribunal premises as the record testifies. That, the alleged evidence taken at the locus in quo was not decisive and never occasioned miscarriage of justice to warrant the nullification of the findings of the trial tribunal.

On the third ground, Mr. Kipoko stated that the tribunal was justified to determine the case based on the fact that the application form indicated the value of the subject matter to be within the pecuniary limit of the statutory prescribed jurisdiction of the trial tribunal.

It was submitted further that, the trial tribunal presided on the case as a fresh case and in its original jurisdiction of which as on the face of the pleadings and evidence before the trial tribunal it found to have jurisdiction and went on to determine it accordingly. The learned counsel prayed that the decision of the trial tribunal be confirmed and the appeal be dismissed with costs.

In his rejoinder Mr. Mbaraka submitted that the respondent's counsel has made a reply to the submission in chief knowing that the party being referred was Michael Christopher Moshi and not Michael Christopher who did not instruct him. He cited the case of **Murugwa Stanslaus John v. ITV Limited, Revision No. 733 of 2019**, at page 5, 5th paragraph, High Court of Tanzania, Labour Division at Dar es Salaam (unreported) in which Hon. Muruke J stated that:

"It should be noted that party to the suit/dispute have come to court to seek redress. They have not come to be punished for small mistakes they do in their conduct of the cases. Equally, they cannot

be punished for small irregularities that can be easily corrected without injustice to the other party.”

From the above quoted decision Mr. Mbaraka was of the view that writing the respondent as Michael Christopher instead of Michael Christopher Moshi cannot lead this court to dismiss their submission in chief as it was a small mistake and human error of which cannot occasion injustice to the other party.

Concerning the issue of representative suit, it was re-joined that it seemed that the application filed before the trial tribunal had nothing to do with Dastan Christopher Moshi, Luka Christopher Moshi and Willence Christopher Moshi. That, the judgment of the trial tribunal from the first page explains who filed the application and on behalf of whom. Mr. Mbaraka alleged further that their submission in chief explain how the trial Chairman erred in law and fact by treating the power of attorney in substitute of representative suit of which the applicant represented parties who had the same interest over the land in dispute. That, the application does not provide the names of other parties who are being represented by Michael Christopher Moshi of which even if the respondent succeeds the decree cannot be executed due to such illegality.

The learned counsel for the appellant was of the opinion that the reply of the respondent's counsel gives the court strong reason to allow the appeal with costs.

On the second ground of appeal, Mr. Mbaraka reiterated his submission in chief and what was held in the case of **Kimoni Dimitri** (supra), that for a visit of the locus in quo to be meaningful it is instructive for the trial Judge or Magistrate to: One, ensure that all parties, their witness and

their advocate if any, are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo. Three, allow cross examination by either party or his counsel. Four, record all proceedings at the locus in quo. Five, record any observation, opinion or conclusion of the court including drawing a sketch map, if necessary, which must be known to the parties.

It was submitted further that, according to the above observation and case law, how can evidence taken without oath not be decisive and cause miscarriage of justice? That, what transpired at the locus in quo was contrary to the law.

On the third ground of appeal, it was re-joined that their submission in chief elaborated well the issue of jurisdiction while what has been replied by the counsel for the respondent is nothing but misleading this honourable court.

Having considered submissions of both parties, I would like to start with the first ground which concerns locus standi. **Section 30 of the Land Disputes Courts Act, Cap 216** provides that:

*"Proceeding of the District Land and Housing Tribunal shall be held in public and a party to the proceedings **may appear in person or by an advocate or any relative or any member of the household** or authorized officer of a body corporate."* Emphasis added

From the above quoted provision, it goes without saying that, the procedure before the District Land and Housing Tribunal allows a relative to appear on behalf of a party to the dispute. In our case, the respondent attached a power of attorney granted by his sibling brothers, at the same

time he was among the owners of the disputed land which is alleged to have been inherited from their father. The application instituted before the trial tribunal is self-explanatory. However, the said donors of the said power of attorney were not joined as parties to the suit. As a matter of procedure, they were supposed to appear as parties to the suit. The learned counsel for the respondent was of the view that the issue of representative suit was misplaced as the application before the trial tribunal was filed by MICHAEL CHRISTOPHER MUSHI and the tribunal declared him lawful owner of the disputed land. In other words, the learned counsel was denying that the respondent did not institute the dispute on behalf of his siblings. With respect, I wish to quote from page 1 of Land Application No. 55/2020, paragraph 6 (a) (i). It reads:

"6 (a) Cause of Action/brief statement of facts constituting the claim.

(i) That, the applicant and his brothers are the lawful owners of the suit land since 1985 as they inherited the same from their father Christopher Moshi."

As rightly submitted by the learned counsel for the appellant at page 1 last paragraph of the judgment of the trial court, it is recorded that:

"Kwenye madai haya mdai pamoja na hati ya uwakilishi (Power of attorney) kutoka kwa ndugu zake ambao ni: -

- 1. Dastan Christopher Moshi*
- 2. Luka Christopher Moshi*
- 3. Willence Christopher Moshi*

Watajwa hapo juu wanadai umiliki wa eneo lenye ukubwa wa mita 12 kwa mita 12 lililopo Kilacha Mwika Kusini, Wilaya ya Moshi.

*Kwenye hati ya madai, **wadai** tajwa hapo juu wanadai kwamba **wadai na mwakilishi wao** wamemiliki eneo la mgogoro tangu mwaka 1985 baada ya kurithi toka kwa baba yao Christopher Moshi hadi lilivyovamiwa na mdaiwa mwaka 2016.*”Emphasis added

In its decision at page 7 the trial tribunal declared inter alia that:

"- Wadai ndio wamiliki halali wa eneo la mgogoro lenye ukubwa wa mita 12 kwa 12 kwani sehemu ya neo lao."

As I have already said, for a person to be represented, he should first be a party to the suit. In this case the aforementioned brothers of the respondent were not made party to the suit, though they were declared owners of the disputed land. I concur with the learned counsel for the appellant that in the circumstances of this case, the respondent had no locus standi to sue on behalf of his brothers who were not party to the suit at any time. Therefore, the first ground of appeal has merit.

Apart from that, Land Application No. 55/2020 was instituted in contravention of the order of trial de novo in Land Appeal No. 10/2019. When the matter is ordered to be tried afresh, it means it is between the same parties and same subject matter. In this case as rightly submitted by the learned counsel for the appellant, the subject matter is the same but the parties are different from the former suit.

On the second ground of appeal which faults the visit to the locus in quo; the learned counsel for the appellant submitted that the laid down procedures of visiting locus in quo were not complied with. On the other hand, Mr. Kipoko for the respondent submitted that evidence which led to the determination of the case before the trial tribunal was taken under

oath within the tribunal premises. That, the alleged evidence taken at the locus in quo was not decisive and never occasioned miscarriage of justice.

I have examined the judgment of the trial tribunal; I concur with the learned counsel for the respondent that the learned trial Chairman did not refer to the visit to the locus in quo in its decision. Reference was made to evidence tendered by both parties before the tribunal. Thus, I dismiss the second ground of appeal.

On the third ground of appeal which is to the effect that the trial tribunal lacked jurisdiction to determine this matter; Mr. Kipoko was of the view that the tribunal was justified to determine the case based on the fact that the pecuniary value of the subject matter indicated in the application form was within the pecuniary limit of the statutory prescribed jurisdiction of the district tribunal.

Section 33 (1) (a), (b) and (2) (a) and (b) of the Land Disputes Courts Act (supra) provides that:

"33. -(1) The District Land and Housing Tribunal shall have and exercise original jurisdiction-

(a) in all proceedings under the Land Act, the Village Land Act, the Customary Leaseholds (Enfranchisement) Act, the Rent Restriction Act and the Regulation of Land Tenure (Established Village) Act; and

(b) in all such other proceedings relating to land under any written law in respect of which jurisdiction is conferred on a District Land and Housing Tribunal by any such law.

(2) The jurisdiction conferred under subsection (1) shall be limited-

*(a) in proceedings for the recovery of possession of immovable property, to proceedings **in which the value of the property does not exceed three hundred million shillings; and***

*(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings **in which the value of the subject matter does not exceed two hundred million shillings.***"Emphasis added

According to the above quoted provision, I agree with the learned counsel for the respondent that the pecuniary value of the subject matter in this case was within the prescribed limit of the jurisdiction of the district tribunal. Thus, the third ground of appeal is unfounded.

Having discussed the three argued grounds of appeal and having found that the first ground has merit, I hereby quash the decision of the trial tribunal, set aside its orders and allow this appeal with costs.

It is so ordered.

Dated at Moshi this 5th day of December 2022.



X

A handwritten signature in blue ink, appearing to read "S. H. Simfukwe", is placed over a light blue rectangular background.

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE